FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1922.

FREDERICK WESCHE, Appellant, v. THOMAS W. MILLER, as Alien Property Custodian.	No. 292.
COMMERCIAL TRUST COMPANY OF NEW JERSEY, Appellant, v. THOMAS W. MILLER, as Alien Property Custodian.	No. 575.
CHARLES J. AHRENFELDT, Appellant, v. THOMAS W. MILLER, as Alien Property Custodian.	No. 576.

(CONSOLIDATED CASES.)

No. 292, APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY; AND NOS. 575 AND 576, FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

REPLY BRIEF FOR APPELLANTS.

We call attention to a mistake of fact on the part of counsel for the appellee.

Through obvious inadvertence he states at pages 10-11 of his brief that:

> "On the hearing the Government introduced "the exhibits filed with the petition which con- "sisted of (1) the report of the trust com- "pany of the Custodian, (2) the formal de- "mand of A. Mitchell Palmer, Custodian, "which recited the fact of his having made "an investigation and determination, and (3) "the formal demand of the petitioner Garvan, "which contained the recital of his investiga- "tion and determination as to the ownership "of the property, and that it was held for an "alien enemy."

In this statement he falls into three errors. None of the documents mentioned were filed with the petition. Annexed to the petition were papers alleged to be copies of such documents, but the correctness of the copies was challenged.

Document (1) mentioned by him was introduced in evidence.

Neither document (2) nor document (3) was introduced or offered in evidence. And this is distinctly and in terms set forth in the "Statement of all evidence and proceeding at the Hearing" settled by the District Judge who heard the cause. The statement shows that the Custodian introduced in evidence the original report by the Trust Company (his document [1]), and a subsequent letter from it, which is set out in full, and the statement then proceeds:

> "Aside from the submission of said two "papers the petitioner introduced no further "evidence and rested."
>
> (Com. Trust Co. Record, pp. 101-103; Wesche Record, pp. 141-145; Ahrenfeldt Record, pp. 74-76.)

The omission to offer these demands (2) and (3) was in fact one more indication of the character of the proceeding here before the court.

Argument in Reply.

The brief of the appellee is most noticeable for its omissions. It offers no reply to our contention that the present proceeding, instituted in equity, was not a purely possessory one such as those this Court considered in *Commercial Trust Co.* vs. *Garvan*, 254 U. S. 554, but distinctly petitory in character; and it contains no reference to the radical differences between the petition here and the petitions in those cases. Those features and their consequences are taken up and discussed under Points XI and XII of our main briefs.

Save for the erroneous statement concerning the evidence introduced by him, to which we have called attention, the appellee makes no attempt to contend that he produced any evidence before the Court that any determination had been made by either Custodian or any investigation. He does not take up in any way the question of necessity of such prior investigation to give any life to the Custodian's determination, and does not dispute that the alleged determinations were not made by the Custodian personally.

The appellee confines his argument to three points. Each of these three points and each of the subdivisions under his first point involve *non-sequiturs*, and no one of them meets even the corresponding contention that has been made on behalf of the appellants.

We take up the appellee's contentions briefly, numbering our replies in conformity with the appellee's points to which they are directed.

POINT I.

The objections raised to the constitutionality of the Trading With the Enemy Act, when sought to be made applicable here to the cases of Ahrenfeldt and Wesche, were well taken.

Counsel for the appellee has not questioned the general doctrine expressly declared by the Circuit Court of Appeals and impliedly declared by this Court in *Central Trust Co.* vs. *Garvan.*

> "If persons not alien enemies, or allies of "alien enemies were given no means to "protect their interests in such property "the seizure would be unconstitutional as "without due process of law."
>
> *Garvan* v. *$20,000 Bonds*, 265 Fed. 477, 479.
>
> *Central Trust Co.* v. *Garvan*, 254 U. S. 554, 566.

But he seeks to avoid its consequences by three arguments which we meet respectively as follows:

1) *Prior to the amendment of July 11, 1919, suit could not be instituted in the District of Columbia against the Custodian by virtue of the provisions of the Judicial Code, to recover property wrongfully seized by him.*

His first sub-point, that the failure to provide in the Act, until July 11th, 1919, for the suit in any Court save the United States District Court for the District in which the claimant resided,

did not prevent the bringing of suit in the District of Columbia under Section 51 of the Judicial Code, is clearly untenable.

By Section 9 of the Trading With the Enemy Act it was expressly and in terms provided:

> "Except as herein provided the money or "other property conveyed, transferred, as- "signed, delivered or paid to the Alien Prop- "erty Custodian *shall not be* liable to lien, "attachment, garnishment, trustee process or "execution, *or subject to order or decree of "any court.*"

It is thus not a case of mere failure to provide, but of affirmative prohibition of proceeding under other acts.

2) *The subsequent amendment of the Trading With the Enemy Act on July 11, 1919, did not relieve constitutional defects of the original demands made before that date, so as to render them valid.*

As to this point we need only refer to the full discussion under Point X of the main brief on the appeal of Wesche, No. 292.

The argument there advanced remains unanswered.

3) *The Commercial Trust Company had no standing to bring a proceeding to reclaim the property if it once delivered it to the Custodian.*

If the Trust Company surrendered property in response to a demand therefor by the Custodian, the delivery by virtue of Section 7, e) of the Act would be a full acquittance and discharge of the Trust Company *for all purposes of its obligation.*

A proceeding to recover the property under the provisions of Section 9, could be maintained only by a party having an interest for his own interest. After delivery and discharge from all obligation the Trust Company could have no interest authorizing it to maintain such a proceeding for the benefit of any other person.

POINT II.

Lack of right to adjudication of the ultimate rights of the claimants cannot obviate the necessity of the Custodian showing probable cause in order to obtain the aid of the Court.

If we had made ourselves entirely clear in the main brief the appellee would have seen that our main briefs presented the following contentions:

If the present proceeding was not a purely possessory one but petitory in its nature (as contended in our main briefs Points XI and XII) the appellee's present point is obviously unsound.

But if this was a purely possessory proceeding the appellee's Point II is still wholly beside the mark.

Assuming the proceeding to be a purely possessory one, permitting no issue on the ultimate rights, still the Court had no power to issue such a warrant as the Custodian asked "but upon probable cause supported by oath or affirmation."

The brief for the Custodian confuses the two distinct things: establishing probable cause and proceeding to final determination of the rights of the parties.

If the Custodian had shown probable cause (other outside questions being laid aside), under the rule established by this Court in *Central Trust Co.* vs. *Garvan* issue could not have been taken as to the correctness of his showing and required to be tried out in a purely possessory proceeding, any more than the general merits of an action could be tried out on a motion to vacate an attachment, or statutory writ of replevin.

But, since the Custodian failed to show *probable cause* supported by oath or affirmation, the Court, even without deciding the rights of the parties, was bound to refuse to aid him by the issue of a warrant.

The question whether he had shown "probable cause" was open on this application, just as a preliminary motion to vacate a writ of attachment or replevin would lie for the fatal lack of a showing of jurisdictional matters in the plaintiff's own papers.

Determination whether the Custodian has shown probable cause is a totally distinct matter from finally adjudicating the rights of the parties.

The two distinct matters of final determination and showing probable cause are not to be confused, simply because the Custodian in addition to admitting that he *had not shown probable cause*, also admitted that there wasn't a possibility of his doing so, and that the property of Wesche and Ahrenfeldt not only did not appear to be, but actually was not enemy property.

To say that there cannot be final adjudication of rights in the proceeding is no answer to the objection that the Custodian wholly failed to make the showing of probable cause, which was required before a warrant could issue.

POINT III.

If the original demands were not valid when made, they could not be made valid by new decision or decree for delivery after the declaration of peace on July 2nd, 1921.

The contention made by the appellee as to the Peace Resolution and the Peace Treaty suggests that we failed to make our main point on this subject clear to his counsel, and may have correspondingly failed to make it clear to this Court.

Our prime contention on this point is that the original demands, so far as they affected property of Wesche and of Ahrenfeldt, were unconstitutional when made and void, that they could not be given a validity as a seizure, which they had not acquired before the end of the war, by a decision and decree first given after the war had come to an end, and the right of capture been terminated; especially as no attempt to claim their interests had been made.

In the case of *Matter of Miller*, 281 Fed. 764, cited by appellee, the demands relied on were of property belonging respectively to the two appellants. As to each of them it was admitted that a demand, valid when made, of their interests, had been made by the Custodian before the end of the war and such demand existed irrespective of any decree entered after the conclusion of war. Here the condition is entirely different and the question here presented was not in that case presented or passed upon.

In that case it was, however, admitted that one of the two appellants was a woman who stood in

the same position of being an American woman, who had married a German, as were Madam von Schierholz and Madam von Uxküll-Gyllenband. On that ground the Custodian in that case consented that the decree for delivery as to her property should be reversed and it was reversed.

Here the only person whose property was demanded was Mrs. von Schierholz and admittedly she came under the provisions of Subdivision 3) of Section 9a of the Trading With the Enemy Act, if not as it stood June 5th, 1920, certainly as amended on February 27th, 1921.

Nevertheless, it is on the sole foundation of a demand of property as that of Mrs. von Schierholz, an American woman, entitled to the return of her property, that the Custodian in this case seeks after the war to enforce delivery to him of property, which he, in open court, admitted was not hers but belonged to other persons, for delivery of whose property as such, he had made no demand and had no foundation for making any. The decision in *Matter of Miller*, 281 Fed. 764 does not sustain any such doctrine.

The three points thus advanced by the appellee fail to sustain his contentions or to obviate the contentions of the appellants, and their points remain practically unanswered.

Respectfully submitted,

SELDEN BACON,
Counsel for Appellants in
Nos. 292, 575 and 576.